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# Comment

## Enforcement of Equal Employment Opportunity Under the Civil Rights Act: How About Cease and Desist Powers?

### INTRODUCTION

In spite of its being emphasized in the Declaration of Independence, equality as a right guaranteed by government has not received the judicial recognition necessary to transform the concept into a workable reality. Historically, England had no such declaration or institution,<sup>1</sup> and there was no expression of general equality in the Constitution until the adoption of the Fourteenth Amendment. Its inclusion was primarily motivated by the demand for just treatment of the Negro, and the focus of judicial scrutiny regarding this ideal today relates essentially to racial issues. Nevertheless, it is now well settled that this protection extends to all races, and individuals.<sup>2</sup>

Throughout our history, the law has been basically indifferent in promoting practical equality. In the legislative realm, this attitude changed with the "New Deal" of the 1930's, especially in the area of labor law, but judicially, the reformation did not occur until the now famous case of *Brown v. Board of Education*.<sup>3</sup> Generally speaking, most Americans have come to realize that the desire for equality is not merely a racial concept; that each of us is frequently in a minority of some kind. Increasing legislation intended to secure equal treatment for all persons, together with the broadening application of existing laws to innumerable circumstances, combined with the potent provisions of the Constitution demonstrates our hope and faith in the law and government to assist us in attaining a most basic right.<sup>4</sup> A dynamic

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1. Wilson, *The Merging Concepts of Liberty and Equality*, 12 WASH. & LEE L. REV. 182 (1955).

2. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

3. 347 U.S. 483 (1954).

4. Kellet, *The Expansion of Equality*, 37 SO. CALIF. L. REV. 400, 424 (1964).

method which the government may utilize to promote, expand, and realize the elusive goal of equality in employment opportunity is urgently needed. Under presently existing legislation the concept of equal employment opportunity is primarily the concern of Title VII of the Civil Rights Act of 1964.<sup>5</sup>

#### RELATIONSHIP OF LAW AND EQUAL EMPLOYMENT OPPORTUNITY

Employment discrimination is a major cause<sup>6</sup> contributing to the disadvantaged economic and social status<sup>7</sup> of Negroes and all minorities in America. The late President Kennedy in his message to Congress requesting passage of the Civil Rights Act remarked:

Racial discrimination in employment is especially injurious to its victims and to the national economy. It results in a great waste of human resources and creates serious community problems. It is moreover, inconsistent with the democratic principle that no man should be denied employment commensurate with his abilities because of his race or creed or ancestry.<sup>8</sup>

The Council of Economic Advisors has estimated that we are losing 17 billion dollars a year in our gross national product as the result of racial discrimination.<sup>9</sup> Of those forms of discrimination which are the target of the Civil Rights Act of 1964,<sup>10</sup> discrimination in employment is the most widespread and undoubtedly the most harmful to society. The cumulative effect of patterns of discrimination in employment is to impose permanent disabilities on Negroes and members of other minority groups, to embitter them, to waste their talents, to divert

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5. Subchapter VII protects all people exercising their right to obtain employment, as well as participating in unions in industries affecting interstate commerce. 78 Stat. 241, 42 U.S.C. § 2000e (1964).

6. On the relation between employment discrimination and the deprived economic status of Negroes, see, M. HARRINGTON, *THE OTHER AMERICA*, 61-81 (1962); *Hearings on H.R. 405, and other bills relating to Equal Employment Opportunity Before the General Subcommittee On Labor of the House Committee On Education and Labor*, 88th Cong., 1st Sess., 176, 181 (1963) (statement of Julius Hobson, then Chairman, Washington CORE).

7. On the economic status of Negroes, see, *The Economic Situation of Negroes in the U.S.*, DEP'T OF LABOR BULL., No. s-3 (Supps. 1960 & 1961); and the 1963 House Hearings on Equal Employment Opportunity, *supra* note 6.

8. 109 CONG. REC. 3248 (1963).

9. Council of Economic Advisors, *Cost of Racial Discrimination*, Sept. 25, 1962.

10. Subchapter I, strengthens the protection by the Federal Government of voting rights; Subchapter II, prohibits the denial of equal treatment in places of public accommodation; Subchapter III, IV, VI, protects all people in exercising their rights to obtain governmental facilities, and public education. 78 Stat. Ann. 241, 42 U.S.C.A. § 1971 (1964).

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their energies into harmful directions, and to estrange them from our cultural life.<sup>11</sup> What then is the relationship of law to this problem of equal employment opportunity?

Any inquiry in this area must commence from a recognition of three basic facts:

- First* — that of discrimination in American life—some of it willful and bigoted; most of it unwitting and flowing from well established patterns of business and community behavior;
- Second* — that of the desire of business, labor, and the general community to promote racial harmony, and equal employment opportunity. This fact is no less real or significant than the fact of discrimination itself;
- Third* — it must be realized that a substantial number of minority group workers are underqualified for jobs offered by industries—underqualified but qualifiable.<sup>12</sup>

Broadly speaking, three views on the question of the proper role of law in the equal employment opportunity problem have been vehemently debated for a number of years.<sup>13</sup> One view holds that this is an area in which the application of the law is inappropriate because such a law is unconstitutional, unworkable, or undesirable.<sup>14</sup> Another contention is that the law is a panacea for the problems of groups which suffer from discrimination and that enforcement of equal employment legislation is the key to a prompt solution.<sup>15</sup> Lastly, some argue that while the role of law is limited, it may be used as an effective tool in gradually eliminating, to some extent, unreasonable discrimination in employment practices.<sup>16</sup> It is submitted that the law, which has the traditional role as the protector of vested interests, should also adopt the role as an innovator of change in the quest for equality in employment opportunity. The law has too often been viewed by minorities, especially the poor, as the tool of the oppressors in society. Landlords, loan sharks, businessmen specializing in shady installment credit plans are represented by counsel on a fairly permanent basis. But who has

11. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964).

12. Remarks by F. D. Roosevelt, Jr., 7 B.C. IND. & COM. L. REV. 413 (1966).

13. See CONG. Q. SERV., *Revolution in Civil Rights*, 3-5, 21-25, 35, 36, 38 (1965).

14. See 110 CONG. REC. 13077 (1964) (remarks of Senator Ervin).

15. See note 6, *supra*.

16. Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. IND. & COM. L. REV. 417 (1966).

represented and spoken for tenants, debtors, and consumers<sup>17</sup> The true force of the law which is its capacity to initiate change and its flexibility to accept and to mold change is a major factor in society today.<sup>18</sup> The Civil Rights Act of 1964, for the first time employs modern government processes to protect the interests of members of minority groups. In a legal sense, minority group members now have a vested interest protected by legislation in an equal employment opportunity. Thus, the law may serve both the traditional role as the great protector of vested interests and the dynamic role of the great innovator of change in its search for equality.

Ostensibly, whenever a particular law fails in its traditional role, necessity commands that new methods of attaining desirable ends be adopted. Presently, Title VII has been a colossal failure in eradicating discrimination in employment. This can be primarily attributed to the lack of effective enforcement powers under Title VII. The time has come for change.

#### THE INEFFECTIVENESS OF THE ENFORCEMENT SCHEME OF TITLE VII

The principal enforcement responsibility under Title VII has been assigned to the Equal Employment Opportunity Commission created by § 705.<sup>19</sup> The chief responsibilities granted to the Commission are the investigation and conciliation of complaints, the promulgation of record keeping requirements, and the participation in a variety of co-operative efforts to further voluntary compliance with the law. Furthermore, the Commission plays a significant role as interpreter of Title VII's provisions. Notwithstanding its authority under § 709 (c) and (d) to require the keeping of records and reports, such activity amounts to nothing greater than issuing procedural regulations. It has no quasi-legislative power with respect to substantive rights and obligations. However, on the other hand, the Commission must interpret the scope of Title VII in order to properly dispense with cases arising thereunder, and § 713 (b) specifically provides for good faith reliance

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17. Marshall, *Law and the Quest for Equality*, 1967 WASH. U.L.Q. 1.

18. *Id.* at 9.

19. The Commission consists of 5 members each appointed for staggered terms by the President with the advice and consent of the Senate. Not more than three of the Commissioners can be members of the same political party. The Chairman and Vice-Chairman are designated by the President. The Chairman is responsible for the administrative operations of the Commission and the appointment of personnel. See note 11 *supra*, at 81.

on a formal Commission interpretation as a defense to a charge of an unlawful employment practice. Eventually, Commission interpretations may have some legal effect in the courts even though they lack the full force of the law behind them. Moreover, Commission interpretations may come to be regarded as a body of experience and informed judgement to which courts and litigants may properly resort for guidance.<sup>20</sup>

*Complaint procedure:* The machinery of the Commission commences with the filing of a written charge of unlawful discrimination. The charge must be duly filed within 90 days after the occurrence of the alleged discrimination.<sup>21</sup> Upon receipt of the charge the Commission initiates an investigation and if it determines there is "reasonable cause" to believe a violation has occurred, it endeavors to eliminate the unlawful employment practice by informal methods of conference, conciliation, and persuasion. If the Commission is unable to obtain voluntary compliance through these informal methods, the aggrieved party may seek relief by suit in the Federal Court.

The number of criticisms which can be leveled at the above enforcement proceedings are innumerable.<sup>22</sup> Most criticisms may be properly discussed in other individual articles because of the necessity to analyze in depth those deficiencies. Nevertheless, the following criticisms illustrate the most significant problems with the Civil Rights Act enforcement methods.

#### CRITICISMS OF THE COMMISSION'S ADMINISTRATIVE PROCEDURES

The Commission, as it presently exists, is not authorized to conduct an investigation in the absence of a formal charge. This is a serious flaw since experience demonstrates that administrative agencies achieve more positive results through broad investigative procedures of employment patterns and practices than through methods designed to accomplish the resolution of individual complaints.<sup>23</sup> Indeed, the

20. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140. See DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 5.03.

21. Such a charge may be filed by the person aggrieved or by a Commission where he has reasonable cause to believe a violation of the title has occurred. The Commission is not authorized to conduct an investigation in the absence of a formal charge. See note 11 *supra*, at 82.

22. See generally, *Symposium on the 1964 Civil Rights Act*, 7 B.C. IND. & COM L. REV. 413 (1966).

23. NORGREN AND HILL, *TOWARD FAIR EMPLOYMENT* 108-110 (1964); Powers, *Federal Procurement and Equal Employment Opportunity*, 29 LAW & CONTEMP. PROB. 468, 484-85 (1964).

individual complaint process is very slow and laborious, and usually does not change the racial employment pattern of a company or industry.<sup>24</sup>

Harold Baron of the Chicago Urban League commented in his excellent study on Negro unemployment that:

Statutory remedies that rely on individual complaints by aggrieved parties are slow and permit many subtle subterfuges on the part of the discriminators. Relatively few individuals receive better jobs or housing under the protection of these measures, and the basic pattern of second class citizenship remains unchanged.<sup>25</sup>

The Federal government should have learned from the lessons of the past, that given the significant developments of the American economy during the last 20 years, those states with Fair Employment Practice Commissions (FEPC), upon which the federal legislation was modeled, have seriously failed to erase employment discrimination. Significantly, during the spring and summer of 1963 and 1964, the largest and most dramatic public demonstrations against job discrimination occurred in states with FEPC laws such as New York, Pennsylvania, and California. It is noteworthy that Negro unemployment in those states is among the highest in the nation.<sup>26</sup>

History bears out the fact that administrative agencies need broad investigative powers to be effective, otherwise, they are destined for obsolescence in the graveyard of bureaucratic red-tape. The result is that the agency stands as an insurmountable roadblock to the attainment of the ideal for which it was created. This should not, and can not be allowed to happen to the EEOC.

The most glaring deficiency of Title VII's enforcement scheme is the concept of voluntary compliance by businessmen and labor unions to the Commission's rulings and the respective provisions of the Civil Rights Act. Citizens may justifiably question why the government created such a costly administrative agency designed merely to inform business people and labor unions of their possible unlawful conduct, when other methods, such as moral suasion are available, would probably attain better results, and are notably cheaper. Voluntary compliance simply means that the government is requesting that the "violators" obey the law. Nevertheless, if the law is not obeyed, unlike

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24. Hill, *Twenty Years of State Fair Employment Practice Commissions; A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1964).

25. Baron, *Negro Unemployment, A Case Study*, 3 NEW UNIV. THOUGHT 42 (1963).

26. Hill, *supra* note 24.

other "wrongdoers", no legal sanctions will result. This enforcement procedure, amounts to nothing more than a slap on the wrist. The procedure is unfair to both the aggrieved party and businessmen alike. The unfairness exists because feelings, prejudice, and discrimination are deeply rooted, frequently taking forms so subtle that the perpetrator is unaware of his discriminatory conduct. To believe that with one great sweep of its hand, the law, absent stringent enforcement guidelines and powers, can overcome these deep-seated hatreds is ludicrous and a blatant disregard of human nature. A mandatory compliance plan is urgently needed to put teeth into the enforcement scheme of the Civil Rights Act.

Two of the most formidable deficiencies of leaving an important part of the enforcement process to private individuals is their inability to finance the legal actions, and the self-imposed inhibitions which grow out of fear of personal reprisal. Title VII has committed to private individuals the last step in the enforcement process—court action. The Commission's conciliation services are free, being financed by the government.<sup>27</sup> However, court action can be maintained at the expense of the government only when it is brought by the Attorney General as a pattern or practice suit, or if the Attorney General elects to intervene in the individual's action.<sup>28</sup>

It is indeed hard, if not impossible, to accurately measure to the fullest extent the effect of these two factors. It would appear certain, however, that after many years of exposure to discriminatory practices, the victim is not likely to believe that all or even a few of the wrongs of the past, are now going to be corrected by a legislative enactment lacking the full force of the law behind his effort. Title VII represents a mere token effort to aid minority group members in securing equal employment opportunities. As a result, it would appear that fear of personal reprisal, more than any other single factor, looms as the greatest obstacle for the complainant to overcome. Also, it is naive to assume that an individual lacking adequate financial resources will seek legal aid in an effort to redress his grievance. It goes without saying that few, if any, practicing attorneys are willing to perform

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27. Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 501 (1966).

28. The first suit was noted in 61 LAB. REL. REP. 102 (1966). The statute eases the economic burdens on private persons who conduct enforcement litigation by allowing a court to do the following: (1) appoint an attorney for the complainant; (2) authorize commencement of the action "without payment of fees, costs, or security"; and (3) award an attorney's fee to the complainant if he prevails. Walker, *supra* note 27, at 501.



their services gratuitously. Undoubtedly, the practical advantages will lie heavily with the defendants. Even where the evidence of discrimination is overwhelming in favor of the plaintiff, it cannot be anticipated that many complainants will undertake the heavy burdens of individual suit.

The objective of any law is to right some wrong, or eliminate some evil which threatens the interest of the public. Laws are designed to do the most good for the greatest number of people. However, Title VII contradicts this purpose by depriving the Commission of adequate control over the conciliation proceedings. Since suit is brought, if at all, by the aggrieved party, the result of conciliation necessarily takes the form of a settlement satisfactory to the complainant alone, while the public interest in eliminating the discriminatory practice goes unprotected.<sup>29</sup> The few remedies offered under § 706 are purely personal in nature and have little or no effect on the public interest as a whole.

Another deplorable aspect of the Commission's functioning, as it presently exists, is that the total enforcement procedure is too cumbersome; it permits valid claims to become stale, since frequently, several years intervene before a decision is reached. Indeed, during Congressional debates on the Civil Rights Act, Senator Humphrey stated that it seems clear in view of the structure of Title VII and the time table imposed by § 706 that the complainant may not bring suit without first proceeding through the Commission.<sup>30</sup> In the first six months of the Commission's operations, more than 3000 charges were filed alleging discrimination.<sup>31</sup> Since then, the case load has not been alleviated to any significant degree, while a backlog of cases continues to mount. It is not unusual that a charging party may wait two to three years before a Commission decision is eventually rendered.

Certain deficiencies are injurious to both the employee and the employer. For example, the evidentiary requirement of "reasonable cause" to believe a violation of the Civil Rights Act has occurred, which must be shown before the Commission will initiate any action toward conciliation, conference, or persuasion, does not even necessitate the procurement and promulgation of sufficient evidence to constitute a *prima facie* violation against the employer. Furthermore,

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29. Berg, *supra* note 11, at 86.

30. 110 CONG. REC. 13694 (1964).

31. Roosevelt, *Introduction*, 7 B.C. IND. & COM. L. REV. 413 (1966).

this often leads to granting the benefit of the doubt to the complainant in questionable cases. The end result is an unnecessary harassment of businesses and a multiplicity of superficial claims. Rules of evidence requiring a greater burden of proof are badly needed. By comparison, it may be noted that in proceedings before the National Labor Relations Board, essential matters must be established by a clear preponderance of the evidence,<sup>32</sup> while essential findings must be supported by substantial evidence.<sup>33</sup> In the interest of fundamental fairness to all parties concerned, justice demands at least a traditional minimum evidentiary standard in such crucial matters as arise under the Act.

Title VII is geared to guarantee equal employment opportunity in the job market to all people regardless of race, color, sex, national origin, or religion. The Act attempts to limit employers to consider only things such as performance, potential, ability, efficiency and capacity as determinative factors in hiring procedures. The ascertainment of this goal depends in large measure on whether or not the law was effectively drafted.<sup>34</sup> Suggested criteria have been submitted from prominent authorities on how to judge the merits of a statutory scheme designed to eradicate unreasonable discrimination in employment.<sup>35</sup> The most important criterion for our purposes is that the statutory scheme should be calculated to effectuate a speedy consideration of employment problems, eliminating every unnecessary obstacle to remedial action. The importance of quick action cannot be over-emphasized. One who is the victim of discrimination cannot wait forever to regain his job. He must earn a living immediately and even an award of back pay from the date of the alleged violation will not settle the problem of meeting current living expenses. It is self-evident that the enforcement proceedings of Title VII when measured on the above standard lack significant merit. A dramatic renovation is urgently needed in the enforcement structure. A potent addition would be the conferring of cease and desist powers on the Equal Employment Opportunity Commission.

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32. *NLRB v. Grand Foundries, Inc.*, 362 F.2d 702 (8th Cir. 1966); *Iowa Beef Packers, Inc. v. NLRB*, 331 F.2d 176 (8th Cir. 1964); *Eastern Coal Corp. v. NLRB*, 176 F.2d 131 (4th Cir. 1949).

33. *NLRB v. Mt. Vernon Tel. Corp.*, 352 F.2d 977 (6th Cir. 1965); *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964); *NLRB v. Crosby Chemicals, Inc.*, 274 F.2d 72 (5th Cir. 1960).

34. Cooksey, *supra* note 16, at 421.

35. *Id.* at 421; see also statement of Hon. John F. Henning, Under Secretary of Labor, *Hearings before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess., 100 (1963).

## THE NATURE OF CEASE AND DESIST POWERS

In its original form, Title VII drew heavily from the National Labor Relations Act.<sup>36</sup> It was first proposed that the Civil Rights Act would create a Commission which like the National Labor Relations Board had quasi-judicial powers and authority to issue cease and desist orders enforceable by the courts. In forming its orders and seeking their enforcement the NLRB asserts the public interest in the prevention of unfair labor practices,<sup>37</sup> while the availability to the individual party of certain remedies is secondary as simply a mode of effectuating the public policy of the Act.<sup>38</sup> However, due to a legislative leadership compromise while the original bill was in Committee, the NLRA pattern was trimmed and the emphasis shifted to the resolution of individual grievances.<sup>39</sup>

In order to ascertain the exact nature of cease and desist powers, a brief analysis of the NLRB and its use of this power is relevant not only because of the similarity in the proposed statutory enforcement scheme suggested herein, but also, because such a probe will adequately demonstrate the effectiveness of this methodology, which if properly employed and structured could breath new life into the Civil Rights Act and Title VII, both of which are rapidly losing vitality.

Under the NLRA, the NLRB has the power to order persons found to have committed unfair labor practices to cease and desist from employing those practices.<sup>40</sup> To the alleged violator this means that the character of his previous actions are to cease, and from such conduct the employer is to desist.<sup>41</sup> The propriety and breadth of the order depends on the facts and circumstances of each particular case.<sup>42</sup>

The classic test for the proper use of a cease and desist order is whether the board might reasonably conclude from the evidence that such an order is necessary to prevent the employer from engaging in

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36. 29 U.S.C.A. § 151-168.

37. *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940); *Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co. of New York*, 309 U.S. 261, 265-68 (1940).

38. *NLRB v. Sunshine Mining Co.*, 125 F.2d 757, 761 (9th Cir. 1942); *Waterman v. S.S. Corp. v. NLRB*, 119 F.2d 760, 761 (5th Cir. 1941).

39. Berg, *supra* note 11, at 85.

40. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB v. Swift & Co.*, 108 F.2d 988 (7th Cir. 1940); *NLRB v. Folk Corp.*, 102 F.2d 383 (7th Cir. 1939).

41. *NLRB v. Pacific Greyhound Line, Inc.*, 106 F.2d 867, 868 (9th Cir. 1939).

42. *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *NLRB v. Swift & Co.*, 108 F.2d 988 (7th Cir. 1940).

an unfair labor practice.<sup>43</sup> It has also been held by the NLRB that the scope of the order is to be measured by the character and extent of the employer's past conduct.<sup>44</sup>

When the board has made a determination that an unfair labor practice has been committed, it frequently includes in its order a provision commanding the employer to cease and desist "from in any manner interfering with, restraining or coercing its employees in the exercise of the rights of self organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in concerted activities, for the purpose of collective bargaining . . . as guaranteed by § 7 of the National Labor Relations Act."<sup>45</sup> This provision has been labeled by judges and legal authors alike as the NLRB's "blanket clause."<sup>46</sup> It is submitted that through the vehicle of this clause, the NLRB has wide latitude in determining the scope of its cease and desist orders. Such a weapon is extremely valuable in pursuing the purposes of acts such as the NLRA and the Civil Rights Act.

The language of § 10 (c) states that:

If the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue and cause to be served on such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

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43. *May Department Stores Co. v. NLRB*, 326 U.S. 376 (1945); *Bon-R Reproductions, Inc. v. NLRB*, 309 F.2d 898 (2d Cir. 1962).

44. *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39 (3d Cir. 1942).

45. *NLRB ANN. REP.* 140-141 (1937).

46. The "blanket clause" is justified on the following ground: Section 8 (a) (1) of the NLRA provides, "it shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 10 (a) empowers the board "to prevent any person from engaging in any unfair labor practice (listed in Section 8)." The board's complaint usually alleges, *inter alia*, the unfair labor practice of violating section 8 (a) (1). Section 10 (c) empowers the board to issue an order requiring the employer to cease and desist from such unfair labor practice. Indeed, this statutory authorization presents a compelling argument and is a strong basis upon which to justify the "blanket clause." See, Note, *The Scope of NLRB Cease and Desist Orders: Contempt Proceedings Against the Employer*, 53 *HARV. L. REV.* 472, 475 (1940).

Cases illustrative of situations where the board's broad orders were upheld include: *Precision Fabricators, Inc. v. NLRB*, 204 F.2d 567, (2d Cir. 1953), where the board's order that an employer cease and desist from "in any other manner" violating the NLRA was not too broad as going beyond violations specifically found to have occurred in view of the employer's past conduct. In *Amalgamated Meat Cutters and Butcher Workmen*

This means that the Board must issue a cease and desist order once it has held a hearing and determined that a prohibited practice exists.<sup>47</sup> Notwithstanding this fact, the Board is granted some latitude of discretion in the formulation of affirmative provisions which will effectuate the policies of the Act. It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged,<sup>48</sup> yet the Board's power in this respect is still subject to the court's control under § 10.<sup>49</sup> The court's power of review over a simple cease and desist order is necessarily more limited, for whatever may be the broader policies of the Act, the compelling policy which the courts may not thwart is the Congressional plan and purpose that certain acts are illegal and must be enjoined.<sup>50</sup>

The Supreme Court has held that the Board's order should stand unless it can be demonstrated that it is a "patent attempt" to achieve ends other than those which can be fairly said to effectuate the policies of the Act.<sup>51</sup> Some courts have taken judicial notice of the fact that the administration of the NLRA was granted to the Board and not to the judges of the Courts of Appeals.<sup>52</sup> The Act is administered by a group of men whose constant, day-to-day rapport with problems of labor relations gives them a unique feeling for appropriate solutions to novel questions in the field. For this reason, their solutions are accorded great weight when questioned before judges who usually lack the familiarity.<sup>53</sup>

The Board's power to issue cease and desist orders is analogous to the power of an equity court to issue an injunction.<sup>54</sup> An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining

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of *North America, AFL Local 88 v. NLRB*, 237 F.2d 20 (D.C. Cir. 1956), the court held that the NLRB may fashion an order that not only prohibits actions specifically found to be illegal but also activities which are of a somewhat different nature and which might be resorted to in an attempt to circumvent the board's purpose. Finally in the case of *NLRB v. Moore Dry Kiln Co.*, 320 F.2d 30 (5th Cir. 1963), the court held that the language of the cease and desist order was properly employed in light of evidence of an attitude in opposition, by the employer, to the purposes of the Act in general, even though the order included a statement of all the rights guaranteed in section 7.

47. *Eichleay Corp. v. NLRB*, 206 F.2d 799, 805 (3d Cir. 1953).

48. *International Association of Machinists; Tool and Die Makers Lodge No. 35, etc. v. NLRB*, 311 U.S. 72 (1940).

49. *May Department Stores v. NLRB*, 326 U.S. 376 (1945).

50. *NLRB v. Gonzalez Padlin Co.*, 161 F.2d 353 (1st Cir. 1947); *Eichleay Corp. v. NLRB*, 206 F.2d 799 (3d Cir. 1953).

51. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943).

52. *NLRB v. Kingston Cake Co.*, 206 F.2d 604, 611 (3d Cir. 1953).

53. *Id.*

54. *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *NLRB v. Wm. Tehel Bottling Co.*, 129 F.2d 250 (8th Cir. 1942).

an act which it deems contrary to equity and good conscience.<sup>55</sup> The function or purpose of an injunction is to restrain action or interference of some kind, to furnish preventive relief against irreparable injury, or to preserve the status quo.<sup>56</sup> Significantly, a cease and desist order is not only in the nature of an injunction, but it has been held and is now generally accepted that the affirmative provisions of a cease and desist order are analogous to those of a mandatory injunction.<sup>57</sup>

The innate power of a mandatory injunction renders it very attractive in fulfilling the legislative purpose proposed in Title VII. Unlike a prohibitory injunction, which is primarily designed to correct a wrong of the past in the sense of a redress for injuries already sustained, the design of a mandatory injunction, simply stated, is to prevent further injury not only to private interests, but also the public interests concerned.<sup>58</sup> It is an extraordinary remedial process resorted to usually for the accomplishment of full and complete justice, but most importantly for our purposes, it commands the performance of some positive act.<sup>59</sup>

Indeed, the difference between a prohibitory injunction and a mandatory injunction can be tenuous. Recognizing this fact, several courts have fashioned a test for ascertaining the proper character of a mandatory injunction. For the purpose of determining whether the effect of an injunction is mandatory or prohibitory the result of the enforcement of the writ on the defendant must be considered; if it compels him affirmatively to surrender a position which he holds, and which on the facts alleged by him, he is entitled to maintain, it is mandatory.<sup>60</sup> Moreover, an injunction is mandatory if it has the effect of compelling performance of a substantive act and necessarily contemplates change in relative position or the rights of the parties at the time the injunction is granted or the decree is entered.<sup>61</sup> A mandatory injunction may be granted even though the act complained of has been completed before suit is brought. The complainant, by this

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55. See generally, 43 C.J.S. *Injunctions* § 1, (1945).

56. *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, P.2d 397 (1936).

57. *NLRB v. Wm. Tehel Bottling Co.*, 129 F.2d 250 (8th Cir. 1942).

58. *Troe v. Larson*, 84 Iowa 649, 51 N.W. 179 (1892).

59. *Ohaver v. Fenech*, 206 Cal. 118, 273 P. 555, (1928); *Zetrouer v. Zetrouer*, 89 Fla. 253, 103 So. 625 (1925).

60. *Growers Warehousing Corp. v. W. E. Sawyer Tobacco Co.*, 5 Tenn. App. 619 (1900).

61. *Pomin v. Superior Court in and for El Dorado County*, 112 P.2d 17, 44 Cal. App. 2d 206 (1941).

means, may be returned to the status quo ante.<sup>62</sup> Where the defendant has fully completed the act sought to be restrained after the bill for relief has been filed but before the issuance of any order, the court has the power to compel by mandatory injunction the restoration of the former conditions of things and therefore prevent the unfair gain of an advantage by virtue of a wrongful act.<sup>63</sup>

The scope of remedial orders is important since, unlike violations of the statute, violations of the Board's orders when enforced by judicial decree may be punished as contempt.<sup>64</sup> The Board has broad power to determine the necessary scope of the cease and desist order and decide what relief is appropriate.<sup>65</sup> Its remedial order may be designed to make whole someone who has been deprived of a recognized interest by acts which constitute a violation of the statute;<sup>66</sup> it may fashion remedies appropriate to the needs of each case;<sup>67</sup> or it may determine what remedial measures are best suited to neutralize the unfair labor practices which have occurred.<sup>68</sup> The Board has the power to take appropriate steps to nullify the effect of an employer's illegal conduct and to prevent its enjoyment of any advantage gained thereby.<sup>69</sup> Finally, the Board has no power nor right to promulgate orders which are essentially punitive in nature.<sup>70</sup>

#### HOW CEASE AND DESIST POWERS CAN CURE THE ILLS OF THE EEOC

At the outset, it must be understood that cease and desist powers will not act as a panacea for all the EEOC's problems. Nevertheless, the addition of these powers will more than substantially help the Commission attain the ideal for which it was created.

The conferring of cease and desist powers will greatly increase the investigative powers of the Commission. When the Commission has reliable information that an employer or union is indulging in illegal conduct, it will no longer have to wait for an individual to bring the action through a formal charge. In this manner, the EEOC can

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62. *Sims v. Stuart*, 291 F. 707, (S.D.N.Y. 1929).

63. *St. Louis & S.F.R. Co. v. Cross*, 171 F. 480 (W.D. Okla. 1910).

64. *May Dept. Stores v. NLRB*, 326 U.S. 376 (1945).

65. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

66. *NLRB v. Coats and Clark, Inc.*, 241 F.2d 556 (5th Cir. 1957).

67. *Local 138, International Union of Operating Engineers, AFL-CIO v. NLRB*, 321 F.2d 130 (2d Cir. 1963).

68. *Indiana Metal Products Co. v. NLRB*, 202 F.2d 613 (7th Cir. 1953).

69. *Elastic Stop Nut Corp. v. NLRB*, 142 F.2d 371 (8th Cir. 1944).

70. *NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 823*, 227 F.2d 439 (1955).

function like other effective administrative agencies such as the NLRB, ICC, or the FCC. An employer or union will not be able to strongarm its employees or members and ride roughshod over their statutory rights.

Since under cease and desist powers the individual remedies will be secondary to the public interest served by the Commission, all employees and members will have a substantial interest in the outcome of any case against his or her employer. Furthermore, because of such an overall involvement, the fear of personal reprisal is not likely to be as great in inhibiting other individuals from action. Unified action by a substantial number of employees would encourage others to action, not only in the same plant or industry, but employees in similar or related fields could also become motivated. Affirmative results for complainants will help minority group members come to the realization that the law supports them, thus freeing them from fear of losing a job, receiving a lower salary, or being blacklisted in their respective occupations. To instill faith in the law among people living under the social and numerous other injustices of the day is something this country urgently needs. Cease and desist powers will add to Title VII that missing element whose absence has plagued the Commission from its inception. Faith in the law is difficult to measure, but the end results will manifest themselves tangibly. To be more specific, an examination of some typical situations which confront the EEOC and its subsequent handling of these cases is relevant at this point.

X, an industrious non-union employee in a non-union plant, with somewhere between 50-100 employees, was hired in 1960. He works eight years as a clerk making small advancements during that period. A promotional opportunity occurs and X applies for the position. In spite of his ample qualifications and seniority rights, X is passed over and an outsider is hired for the job. The only recognizable difference between X, and the outsider is that X is Spanish-American. What can X do right now under the Civil Rights Act to redress his apparent grievance? He can file a claim with the EEOC and possibly wait two to three years for the Commission to decide if he has been discriminated against. Then, he can wait another one to five months to see if an agreement can be reached between himself and his employer. If no agreement is reached, he is in no better position than when he originally filed the complaint. But even if he is successful, can the Com-



mission expect that his effort will motivate others to similar action? The answer lies in how well the other employees will be able to finance the great economic burden of such a venture. The answer also depends upon whether they can withstand the almost certain employer pressures and coercion that will follow.

How will cease and desist powers help the minority group employees such as X? First, the time period will be cut, at least, in half in most cases. The eventual remedy the employee will receive will not be arrived at during a closed door session with his employer in the employer's office, but will be received before a public Commission empowered to see that the law is obeyed, or in the impartial chambers of a courtroom. The minority group member's weapon is now equal or even greater than his adversary. Moreover, via a "blanket clause" which would empower the Commission to outlaw future discriminatory acts of similar nature, the eradication of discriminatory practices toward other employees would result, assuming the facts of the case necessitate such an order. The blanket clause would erase the necessity for further suit by other employees, and thereby, drastically reduce the Commission's case load. An easing of the Commission's case burden would release the machinery of the EEOC to allot more time to carefully scrutinizing other cases. Finally, it is submitted that cease and desist powers would adequately protect minority group members from similar discriminatory behavior in the future.

Another typical situation of employment discrimination is where a group of females have applied for a particular job but none are hired, despite the fact they are physically capable of doing the work. One or several of the women files a complaint with the EEOC. After waiting approximately the same time period as described earlier, and receiving similar treatment, the best the women can expect to receive is a job, usually at a lower pay rate, while the employment pattern and discriminatory practices of the employer remain substantially unchanged for future applicants. Cease and desist powers acting in their capacity as a mandatory injunction, could command a positive act, thus guaranteeing the complainants a job if they were discriminated against, and insuring a salary commensurate with their ability. Such power utilized in this manner not only benefits the aggrieved parties, but in the long run, the public and industry become the real beneficiaries. Many different orders may be fashioned through cease

and desist powers to fit the individual needs of each case. This fact alone, is a compelling reason for conferring such powers on the EEOC.

### CONCLUSION

It is submitted that with the addition of the recommendations previously mentioned, the Equal Employment Opportunity Commission could become a most effective tool in transforming the concept of equality in employment opportunity from the theoretical into a practicable reality. With the addition of cease and desist powers, the machinery of the EEOC would no longer be slow and laborious. The case loads would be substantially reduced. The public interest in eradicating discrimination would be one step closer to actuality. At least, the legislature would have done its part; the rest would be up to the people discriminated against. The Commission would no longer merely slap violators on the wrist, and the ridiculous concept of voluntary compliance would be firmly repudiated. The final step in the enforcement process would emanate from the Commission having adequate financial resources to handle all cases. The individual would not have to fear the loss of substantial financial resources while the case advances through the courts. Lastly, minimum evidentiary requirements would be raised to the level discussed earlier. Where purported violations would be found, they would be backed by substantial evidence, thus insuring fundamental fairness to all parties concerned.

There can be no doubt after analyzing the nature of cease and desist powers that they would act as a deterrent to further violations of the Civil Rights Act. Furthermore, they would put necessary strength into Title VII so that the purposes of the Act might better be attained, rather than remaining empty governmental promises. They would give the EEOC the kind of power that is a necessary prerequisite for any regulatory agency. Cease and desist legislation, if passed by Congress, would tell millions of Americans that the Federal government stands ready to defend their lawful requests for equal opportunity in employment. Any legislation which grants less than cease and desist authority to the EEOC is a cruel hoax on minorities. If this authority is granted, every complainant will have the backing of a federal administrative agency armed with discretion to impose a

court enforceable mandate. Legislation which barely improves the lot of those who have suffered abuse for so long, only serves to heighten the frustration so many feel today; frustration emanating from promises stated in law but not enforceable in fact.

It has been clearly established that the most rapid and equitable remedies that can be offered by an administrative agency are only attained when that agency can issue enforceable orders. Minorities have been patient long enough. Paper pledges are insufficient—the full force of the law is required.<sup>71</sup>

ELMER S. BEATTY

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71. Testimony before Subcommittee on Labor and Public Welfare, by Clifford Alexander, Member EEOC, Aug. 11, 1969.